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No. 88-

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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DAVID HESSE,

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BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

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QUESTIONS PRESENTED

1. Is the determination of whether a teacher's speech is on a matter of public concern an objective test, governed primarily by subject matter, or a subjective one, in which the motive, intent or tone of the speaker is a prime factor?

2. Does the fact that a teacher has differences of opinion with the school administration on issues which would

otherwise be of public concern remove his speech on those issues from First Amendment protection?

3. In applying the balancing test for First Amendment protection to speech of a public school teacher is the embarrassment of a few teachers, without more, sufficient to counterbalance the teacher's interest in speaking out?

4. To the extent that factual issues are a part of the legal determination as to the protected nature of public employee speech, how much deference should be given to the findings of the trial court which has observed the witnesses and heard the testimony?

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REFERENCE TO THE OPINIONS DELIVERED BELOW

The case was tried to a jury in the United States District Court from May 28 to June 4, 1986. The trial court found plaintiff's speech on issues of student discipline, grading and teacher evaluation procedures to be protected speech. Judgment was entered on the Jury's verdict in favor of the Plaintiff on June 4, 1986.

Defendants appealed to the Court of Appeals which rendered its decision on June 10, 1988 reversing the Judgment of the Dictrict Court. (848 F.2d 748)

A timely Petition for Rehearing with Suggestion for Rehearing en Banc was filed by the Plaintiff. The Court of Appeals denied a Rehearing and a Rehearing en Banc on September 9, 1988.

STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT

(i) The Opinion of the Court of Appeals was entered on June 10, 1988.

(ii) A timely Petition for Rehearing was filed; Rehearing was denied on September 9, 1988.

(iii) 28 U.S.C. §1254(1) authorizes this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of

this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

STATEMENT OF THE CASE

Plaintiff, David Hesse, has been an art teacher in Township High School District 211 since 1977. From 1977 until June 1983, the principal supervising Mr. Hesse was Carl Weimer. Under Mr. Weimer, Hesse received a number of evaluations indicating that his performance was average or above and one or more in which a problem was noted. (Pl. ex. 2-7, T. 23-26) In response to some critical memos from Weimer, Hesse authored memoranda which were, *inter alia*, critical of school district policies on student grading and discipline. (Pl. ex. 9, T. 38) No action was taken against Hesse because of these memos.

In September 1983 defendant, Jack Gaza, became principal at Hesse's school. In the fall of 1983, Mr. Gaza called Mr. Hesse to his office to discuss an incident in which Hesse had become angry with his students to impress them with the dangerousness of the equipment in the room. In a subsequent memo, Gaza expressed the opinion that Mr. Hesse viewed himself as a "crusader for the improvement of the system." (Def. ex. 16, T. 43-45; 260-262)

In the winter of 1983-84, on Mr. Hesse's evaluations some areas of needing improvement were noted as were Hesse's "strong differences with the American education system...." (Pl. ex. 13)

On March 2, 1984 Hesse attended a district teachers' conference at which a guest speaker, Dr. Clark, discussed issues of global education. Plaintiff, and later some other teachers, sat in a section of the auditorium where two or three rows had been taped off with masking tape. (T. 46-51) During a question and answer period, plaintiff raised issues of grade inflation, student disciplinary policies and the use of teacher evaluations to stifle teacher dissent. Two

witnesses claimed at trial to have been embarrassed by Mr. Hesse's questions. (T. 391, 395) Subsequent to the teachers' conference, Gaza and Hesse exchanged memos regarding Hesse's behavior at the conference. (Pl. ex. 14-17, T. 53-56)

Shortly after the conference, Gaza assigned Assistant Principal Maddox and Art Department Chair Wheat to draft some "Goals and Objectives" for Hesse, allegedly to remedy his deficiencies in teaching as outlined in his evaluations. (T. 265-266) Gaza then drafted the final document which differed substantially from the Maddox-Wheat notes. At trial, Wheat testified that Hesse was already doing most of the tasks listed in the final document.

Mr. Hesse was presented with the "Goals and Objectives" at a conference on April 25, 1984 and was then evaluated four times in the following two weeks. None of the evaluations reported problems in the areas of the goals and objectives. (T. 63-65, 74-75, Pl. ex. 21-24) Nevertheless, on May 31, 1984 the Board of Education passed a resolution authorizing a "Notice to Remedy" (the first step toward dismissal of a tenured teacher) incorporating the Goals and Objectives as presented to Hesse on April 25. (Pl. ex. 25) Additionally, the Board passed a resolution requiring the plaintiff to undergo a psychiatric evaluation for review by the Board. (Pl. ex. 25) Hesse was told he would be fired if he did not comply. (The demand was later withdrawn in response to a letter by Hesse's attorney.)

In early fall of 1984 Gaza held a meeting with Assistant Principals Kramper and Maddox and Art Department Chair Wheat. Gaza informed them that they should document any of Hesse's behaviors which could be construed as not conforming to the Notice to Remedy and that they should not include anything positive on Hesse's evaluations. (T. 254-255, 274-275, 296-298, Pl. ex. 53) During the fall and winter Mr. Hesse was evaluated numerous times and received a number of negative comments

on each although the Board of Education took no further action to terminate him. Several memos were placed in his personnel file regarding moving his art class outdoors in the spring without advance permission and other claimed transgressions.

For the 1985-86 school year Hesse was transferred to a position traveling between two schools to teach art. In 1986-87 he was again assigned to a school full time.

Suit was filed in November 1985 pursuant to 42 U.S.C. §1983 and the First Amendment to the United States Constitution. The trial court found that Hesse's speech on matters of student discipline, grading and teacher evaluation procedures were on matters of public concern and were entitled to First Amendment protection and the jury was so instructed. The jury returned a verdict in favor of the plaintiff and judgment was entered on the verdict.

On appeal, the Court of Appeals panel, with one dissent, found that only one memorandum written by Hesse was on a matter of public concern because all of his other remarks on the discipline, grading, and evaluation issues grew out of his private disagreement with school district policies. The Court further held that the employer's interest in a harmonious workplace outweighed the teacher's interest in free speech.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT OPINIONS IN ITS APPLICATION OF THE CONNICK TEST AS A SUBJECTIVE MEASURE

In *Connick v. Myers*, 461 U.S. 138 (1983) this Court refined the test for determining whether to accord First Amendment protection to speech by public employees. The questions for the Court are: 1) Is the speech on a matter of public concern? and 2) Do the interests of the employer in operating efficiently outweigh the employee's interests in speaking?

Although the *Connick* decision was apparently meant to provide an objective test for determining whether a dispute over an employee's speech merits federal court intervention, many lower courts, including the Circuit Court in the instant case, have transformed the test into a subjective one, leading to widely varying and conflicting decisions.

A. THE QUESTION OF WHETHER SPEECH IS ON A MATTER OF PUBLIC CONCERN WAS INTERPRETED SUBJECTIVELY IN THE COURT BELOW CONTRARY TO OTHER CIRCUIT COURTS

In the case at bar, the subjects of student discipline, grading and teacher evaluation procedures are certainly matters of public concern since "what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum." *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644 (8th Cir., 1983). Indeed, a substantial portion of this Court's caseload has involved educational issues.

The Court below looked primarily to Hesse's *disagreement* with the school district on issues of discipline, grading and teacher evaluation and interpreted his *intent* as removing the issue from the realm of public concern: "... Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own *private* disagreement with policies and procedures..." (emphasis added, see appendix, p. A-10). The one memorandum which the majority conceded was "arguably" on a matter of public concern was noted to be less sarcastic and offensive. Although the majority denied the dissent's accusation that the sarcastic nature of Hesse's speech caused them to devalue his sentiments, the opinion makes clear the fact that such a standard was used to judge Hesse's speech. (Compare the poem posted by the plaintiff police officer in

Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir., 1986).)

Thus, the tone and the intent of the speaker were given considerable weight over the subject and content of the speech. The Seventh Circuit used similar reasoning to deny the classification of public importance to a claim of sexual harassment because the employee's *goal* in speaking was not to effect social change generally. *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir., 1987) Likewise in *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir., 1987) the Fourth Circuit held that the plaintiff's motive of personal advancement disqualified his participation in an election campaign from First Amendment protection.

By contrast, other Circuits, while noting that the "meaning of the term 'public concern' is not without ambiguity," *Kurtz v. Vickrey*, 855 F.2d 723, 726-27 (11th Cir., 1988), have specifically disapproved focusing on motive or even on efforts to communicate with the public as being inconsistent with *Connick* and contrary to this Court's ruling in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). Also, several Circuits have dismissed the notion that the involvement of an employee in a dispute with the employer automatically removes the employee's comments from the protected category. *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir., 1988.) Nor do criticisms of the employer's actions disqualify the speech from the classification of public concern. *Zamboni v. Stamler*, 847 F.2d 73 (3d Cir., 1988); *Hale v. Ford*, 856 F.2d 255 (D.C. Cir., 1988).

Using the *Connick* test subjectively leads reviewing courts to base their decisions as to the public nature of the speech at least partly on their perceptions of the value of the speech. Such a tendency is only a step away from censorship of "undesirable" ideas. Compare the Fourth Circuit's determination in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir., 1985) that plaintiff's performing off duty in

blackface was entertainment and, as such, fell within the realm of public interest with the Sixth Circuit's decision denying protection to a teacher who showed her class the film "Pink Floyd-The Wall" in *Fowler v. Board of Education of Lincoln County, Kentucky*, 819 F.2d 657 (6th Cir., 1987). Similarly, the Tenth Circuit in *Koch v. City of Hutchinson*, 847 F.2d 1435 (10th Cir., 1988) held that a fire marshall's report that a fatal fire was caused by arson was not of public concern, but in *Conaway v. Smith*, 853 F.2d 789 (10th Cir., 1988) determined that an electrical inspector's refusal to release substandard work was speech of public importance. Newspaper publication of an audit report divulged by an employee in *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir., 1984) and of an interview with a teacher forced to resign his coaching duties in *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir., 1988) were held not to be matters of public concern. However, a published interview of an employee claiming harassment because of her race and her relationship to a court witness in *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir., 1988) was found to be an issue of public concern.

In those cases where the nature of the speech is judged subjectively as in the instant cause, the determination often appears to cloak simple disagreement with the outcome reached by the jury. (See, e.g. *Koch, supra*) Public employee free speech rights are far too important to submerge in a murky quagmire where appellate courts invoke an "objective" test to alter a result which is otherwise supported by the record. As this Court has previously observed, such employees are often the persons most informed about the workings of and faults in public agencies. *Pickering v. Board of Education*, 391 U.S. 563 (1968). For the courts to suppress some speech on otherwise public issues because they disagree with the substance or the manner of what is said is no better than the agencies' doing the same thing. The more clear and objec-

tive the test, the less subject the speech will be to the whim of either the agency or the court system.

B. THE DECISION BELOW EMPLOYED A SUBJECTIVE BALANCING TEST, CREATING IMAGINED HARM TO OUTWEIGH FREE SPEECH, AT ODDS WITH OTHER APPELLATE OPINIONS

Pickering v. Board of Education, 391 U.S. 563 (1968) first established a balancing test to judge whether the employer's interests outweighed the employee's. The *Connick* Court, in endorsing that test, lowered the standard for the employer so that no actual harm need be proven. Although in *Rankin v. McPherson*, ___U.S.___, 107 S.Ct. 2891 (1987) this Court somewhat clarified the weight to be given to potential "disruption" in the balancing process, the evaluation is often very subjective.

The Court below extrapolated great disruption from a scanty record by applying a subjective standard. The only proof of "disruption" was the testimony of two employees that they were embarrassed by Hesse's questions at the teachers' conference. It seems clear that if the *Pickering/Connick* balancing is allowed to be applied subjectively, it can simply serve as a mechanism to set aside a jury verdict which is supported by the record but with which the reviewing court disagrees. It should be noted that the defendants in the instant case claimed Hesse was not punished either for his speech or its effects. It was claimed that his teaching was deficient to such an extent that a Notice to Remedy was required. That claim was found by the jury to be false.

The Court of Appeals took little or no note of the fact that a teacher is not like a police officer or an assistant district attorney. On the contrary, this Court has long recognized the significant public interest in maintaining academic freedom of teachers. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S.

589 (1967). Since no close working relationship or strict discipline is required of a public school teacher, a greater degree of actual disruption should be required to outweigh the employee's free speech rights. *Rankin v. McPherson*, ___U.S.___, 107 S.Ct. 2891, 2900 (1987); *Jurgensen v. Fairfax Co.*, 745 F.2d 868 (D.C. Cir., 1984).

Application of the balancing test as an objective standard eliminates such problems. In *Jackson v. Bair*, 851 F.2d 714, 722 (4th Cir., 1988) the court suggested, "when the employer acts on mere potential for disruption, there must be an *objectively justifiable* basis for his apprehension." (Emphasis added.) Similar standards have been enunciated in other circuits. *Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir., 1988); *American Postal Workers Union v. United States Postal Service*, 830 F.2d 294, 303 (D.C. Cir., 1987).

The use of the subjective test by the reviewing Court further ignores the fact that testimony of witnesses about claimed harm to the employer is important to the weight given to each side in the balance. The trial court is in a far better position to determine whether the disruption is merely a subjective fear of a supervisor, a "red herring" or a genuine problem. In the case at bar, the reviewing court substituted its own determination of what harm had been done for that of the trial judge who observed and heard the witnesses.

Where no concrete damage to the interests of the employer can be shown, particularly where the employee is not in any policy making or close personal relationship position, the reviewing court should not be permitted to engage its imagination to weight the balance in favor of the employer.

II. THE DECISION RAISES IMPORTANT AND RECURRING PROBLEMS CONCERNING THE APPROPRIATE TEST OF PUBLIC EMPLOYEE SPEECH

The test enunciated by the Court in *Connick* has been unevenly applied by the various federal courts leading to decisions that are difficult to reconcile. The opinion has been criticized as adding rather more heat than light to the problem. See, Note, "Public Employees and the First Amendment: *Connick v. Myers*," 15 *Loyola Univ. L.J.* 293 (1984); " The Public Employee's Right of Free Speech: A Proposal for a Fresh Start," 55 *Univ. of Cincinnati L.Rev.* 449 (1986-87); "*Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees," 60 *Indiana L.J.* 339 (1984-85).

Over 20 decisions by Federal Appeals Courts involving First Amendment rights of public employees have been reported during 1988 alone. Of that number at least six have dissenting opinions, some of which take sharp issue with the majority's application of the test to the facts of the case. See, e.g. *Greenberg v. Kmetko*, 840 F.2d 467 (7th Cir., 1988). Given the array of decisions, both public employees and public officials must have some difficulty predicting whether certain types of speech will be granted protection. This Court should take the opportunity now to clarify the manner in which lower courts should judge such cases.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the Judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Attorney for Petitioner

Dated: December 8, 1988

APPENDIX

No. 88-

In The
Supreme Court of the United States
October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For the Seventh Circuit

APPENDIX

1. District Court Order and Final Judgment dated June 4, 1986.

2. Court of Appeals opinion of June 10, 1988 (848 F.2d 748).

3. United States Court of Appeals for the Seventh Circuit Order and Final Judgment dated June 10, 1988.

4. United States Court of Appeals for the Seventh Circuit Order Amending Opinion dated July 7, 1988.

5. United States Court of Appeals for the Seventh Circuit Order Denying Petition for Rehearing and Suggestion for Rehearing *en banc* dated September 9, 1988.

UNITED STATES DISTRICT COURT
NORTHERN ILLINOIS, EASTERN DIVISION

DAVID HESSE,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, et al

DOCKETED
June 6, 1988

85 C 9863

Judge
Nicholas J. Bua
Presiding.

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff, DAVID HESSE, recover of defendants, BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KELLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE, and JACK GAZA, the sum of One Hundred Twenty-Five Thousand and no/100 ($125,000.00) Dollars, plus attorney's fees, with interest thereon at the legal rate, together with his costs of action.

CLERK
H. STUART CUNNINGHAM

DATE
June 4, 1986

DEPUTY CLERK
/s/ Frances D'Andea

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1522

DAVID HESSE,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9863—**Nicholas J. Bua**, *Judge.*

ARGUED SEPTEMBER 25, 1987—DECIDED JUNE 10, 1988

Before FLAUM and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* David Hesse, plaintiff-appellee, prevailed in a jury trial on his claim filed under 42 U.S.C. § 1983 for alleged abridgments of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants in this action are the Board of Education of Township High School in Cook County, Illinois, the seven individual members of the Board, the superintendent of the Township High

School District and the principal of Schaumburg High School. The plaintiff asserted jurisdiction in the district court on the basis of 28 U.S.C. §§ 1331 and 1343. We have jurisdiction to review the final judgment under 28 U.S.C. § 1291. Hesse sought both damages and equitable relief, alleging that the defendants took adverse retaliatory job action against him as a result of the exercise of his right to freedom of expression.

The appellants challenge the verdict on several grounds. They claim that: 1) the plaintiff's statements did not involve matters of public concern because of their personal content; 2) that even if the plaintiff's statements did involve a matter of personal concern, the defendants' interest in maintaining discipline, harmony and efficiency in the public education system outweighed the plaintiff's interest as a citizen in making such statements; 3) that the instructions to the jury were in error; 4) that the job action taken would have occurred irrespective of the plaintiff's expressions; 5) that certain expert testimony should not have been admitted; and 6) that the verdict was excessive in amount. Initially, we dismissed the first appeal of this case because judgment on the jury verdict for damages had left unresolved the plaintiff's claim for equitable relief, but the district court subsequently entered equitable relief for the plaintiff. We will reverse the judgment of the district court and remand with instructions to enter judgment for all the defendants[1] and against the plaintiff.

I

Hesse has taught at schools in the defendants' school district since 1972, and is a tenured teacher. He teaches classes in both art and photography. Between 1972 and 1985, Hesse taught at Schaumburg High School. During the 1985-86 school year, Hesse served as a traveling teach-

[1] After trial, the district court judge suggested a remittitur of a portion of the $125,000 verdict for the plaintiff, but no formal order was ever entered.

er between Hoffman Estates High School and Palatine High School. This transfer to a traveling teacher status for one year underlies the plaintiff's contentions that the defendants took adverse job action against him to retaliate for his expressions on matters of public concern and interest. In addition to this transfer, the plaintiff alleges that the defendants harassed him by requiring him to submit his daily lesson plans to them, forcing him to undergo more classroom evaluations than other teachers, and manipulating his 1984-85 teaching schedule to make it less desirable to him. However, the plaintiff does not complain that any of the job action taken resulted in a diminution of his salary.

As far back as 1978, Hesse's teaching evaluations contained criticisms of his performance. They contained criticisms of his grading policies, of the lack of motivation of his students, of his inability to maintain student discipline and similar matters. For instance, we note from the record that an evaluation dated December 8, 1978 indicated that 93% of the plaintiff's students in Photography I received D's and F's that term. Numerous other evaluations contained negative ratings based on inadequacies in the plaintiff's performance. Not all of Hesse's evaluations were negative, however. Good and even excellent performance ratings were interspersed throughout the evaluations. Nevertheless, the record is clear that the negative evaluations created within Hesse a deep sense of personal animosity toward his superiors, a bitterness evidenced by his personal attacks against these various school officials in the many memoranda that he wrote to them. These memoranda were often sarcastic, unprofessional and insulting in nature. While some of them did criticize school rules or policies, most of the criticisms were not voiced out of a concern for the public. Instead, they merely defended the plaintiff's personal teaching methods.

The plaintiff's personnel record with the school district is replete with evidence of Hesse's personal animosity toward the school officials, and its ultimate disruption to the school environment. Aside from his many rancorous

memoranda reacting to his poor evaluations, Hesse's personnel record details several unprofessional displays of hostility. As an example, in one month the plaintiff referred an unprecedented 42 students to the administration for disciplinary action. In another incident, Hesse threw a temper tantrum in class before his students. The plaintiff's behavior at a March 2, 1984 faculty symposium held at Schaumburg High School, a meeting all teachers were required to attend, exemplifies the plaintiff's disruptive hostility. At the request of the guest speaker, several rows of seats in the back of the hall had been taped off in order to move the audience forward for enhanced visibility and audibility. Resentful of this procedure and apparently of the entire meeting itself, Hesse sat down in the taped area and invited other teachers to follow suit. During the speaker's question and answer session, Hesse embarrassed the other teachers by asking the guest speaker pointed questions pertaining to Hesse's conflicts with the school administration, but unrelated to the speaker's topic. Following this incident, the school principal sent Hesse a memorandum reprimanding him for his behavior at the symposium. In response, Hesse sent back a sarcastic memorandum attacking the school officials, and containing insulting suggestions.

On June 1, 1984, the school board sent the plaintiff a request to undergo psychiatric examination. On the same day, the plaintiff was also given a "Notice to Remedy," which under Illinois law is an early step in the process which may lead to the dismissal of a tenured teacher. However, the request for psychiatric examination was later withdrawn at the request of plaintiff's counsel.

For the 1985-86 school term, the plaintiff was assigned to serve as a teacher traveling between Hoffman Estates High School and Palatine High School. While the defendants contend that this assignment was necessary because only two of Schaumburg High School's four art teachers were qualified to teach photography, it is this assignment which the plaintiff primarily relies upon as constituting

retaliatory adverse employment action taken against him by the defendants.

II

In analyzing the constitutional protection to be accorded Hesse's speech, we must first determine whether the context, content and form of Hesse's statements as revealed by the record as a whole indicate that they were on a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 1690 (1983). The district court instructed the jury that the "plaintiff's statements on the subject of grading and student discipline policies and teacher evaluation procedures constitute speech on matters of public concern and are therefore entitled to constitutional protection." We have considered the plaintiff's expressions from the standpoint of their content, form and context as revealed by the entire record, and have carefully examined all of the various memoranda sent by the plaintiff to the defendants. As a matter of law, we can only conclude that but one of Hesse's memoranda arguably related to a matter of public concern.[2] In the con-

[2] Of the memorandums written by the plaintiff which were introduced into evidence, three defended Hesse's method of supervising students, two constituted his personal response to complaints voiced by parents and students, three concerned the poor teaching evaluations which Hesse received from the administration, two defended Hesse's severe grading policies, two responded to the school administration's criticism of Hesse's behavior at the March 2, 1984 faculty symposium, and three alleged that the school administration was harassing Hesse.

The dissent perfunctorily concludes that Hesse's statements during the Board meeting on October 13, 1984 and during the March 2, 1984 faculty symposium constitute speech on matters of public concern because they touch on matters generally relating to public education. However, *Connick* requires us to analyze the form and context of the speech, as well as the content. We note that the subjects that Hesse allegedly discussed relate to the teaching prac-

(Footnote continued on following page)

text of this case, we hold that the jury instruction constituted prejudicial error.

With the exception noted above and hereinafter described, each of Hesse's memoranda dealt primarily with matters of personal interest to the plaintiff. Under these circumstances, we are not at liberty to review the wisdom of the personnel decision made by the defendants in this case. As the Supreme Court stated in *Connick*: "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appro-

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[2] *continued*

tices for which he had been criticized. The dissent does not proffer any evidence from the record to show that Hesse's statements were more than part of a long-running defense of his teaching practices. In its application of *Pickering* to the faculty symposium incident, the dissent even concedes that Hesse's comments were clearly related to his own negative evaluations.

In Section III and footnote 1 of its analysis, the dissent cites *Rode v. Dellarciprete*, No. 87-5368 (3d Cir. April 28, 1988), for the proposition that an employee's speech arising out of his personal grievance, but dealing with a matter of public concern, may be protected by the first amendment. Hesse's situation is distinguishable from *Rode* precisely because most of Hesse's speech did not deal with an issue of public concern. In *Rode*, a civilian employee of the Pennsylvania State Police ("PSP") had been suspended for a published interview she had given from her home which criticized the PSP. Although Rode's complaints were couched in terms of her employment problems with the PSP, her concerns were more than mere personal grievances. As the Third Circuit noted:

> Rode did not merely claim that she was being mistreated—she claimed that she was a victim of retaliation arising out of racial animus within the PSP. This is a matter of grave public concern, especially in light of the prior protracted history of litigation against the PSP charging it with racial animus in its employment practices . . . .

Rode v. Dellarciprete, No. 87-5368, slip op. at 12 (3d Cir. April 28, 1988).

priate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147, 103 S. Ct. at 1690. While it cannot be gainsaid that educational policies in a public school are matters of public concern, all but one of the plaintiff's memoranda and statements were directed to the defense of his personal teaching methods and his resentment of the evaluations and criticisms of those methods. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149, 103 S. Ct. at 1691.

Even though some of Hesse's memoranda tangentially included general references to public education, an analysis of each memorandum clearly indicates that the memoranda themselves were not intrinsically on a matter of public concern. This Court has noted that "there is a difference between criticism directed at the institution in general and disputes with which the complainant has an intimate personal involvement." *Egger v. Phillips*, 710 F.2d 292, 318 (7th Cir. 1983) (en banc). The fact that a public employee's "verbalized reason for [his lack of cooperation] was a criticism of the institution does not significantly alter the essentially private nature of the dispute." *Id.* at 318. This court has recently reaffirmed its stance that even though an expression may inherently deal with a matter of public concern, the *Connick* test " 'requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?' " *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) (quoting *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985)). The Eleventh Circuit has also noted that "a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions

are run." *Ferrara v. Mills*, 781 F.2d 1508, 1515-16 (11th Cir. 1986). The text of the various memoranda makes clear that Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own private disagreement with policies and procedures which he had either failed to apply or refused to follow.

As previously indicated, only one of the plaintiff's memoranda was arguably directed to a matter of public concern. In the plaintiff's memorandum of December 8, 1984, addressed to the members of the school board and officials at Schaumburg High School, the plaintiff argued that the district's grading policy allowed students to pass regardless of whether they possessed the basic skills required of high school graduates. We consider this memorandum not only under all of the circumstances, but also in isolation. It is far less sarcastic[3] and offensive than the other memoranda, and its primary objective is to criticize the overall grading policy in the school district.

Assuming that the December 8, 1984 memorandum is one dealing with a matter of public concern, we must then consider whether the interests of the plaintiff, as a citizen, in commenting upon a matter of public concern outweigh the interests of the school district and its officials in promoting the efficiency of the public educational system. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968). This Court has stated the test as "whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *McGill v. Board of Educ.*, 602 F.2d 774 (7th Cir. 1979). In es-

[3] Footnote 10 of the dissenting opinion misconstrues our reference to sarcastic speech. We are *not* implying that sarcastic speech is not entitled to constitutional protection. We only note the sarcastic form of Hesse's speech as a measure of its disruption to the workplace, as well as its highly personal tenor. *See, e.g., Callaway v. Hafeman*, 832 F.2d at 417; *Linhart v. Glatfelter*, 771 F.2d at 1010.

sence, we must decide whether the school board was justified in taking the alleged retaliatory action that it did against the plaintiff. In this regard, we must evaluate the need of the school district to maintain harmony and discipline among co-workers in the workplace, as well as the need to assure that the employee can competently perform his duties. *See Egger v. Phillips*, 710 F.2d at 318. Other things we must consider include the employer's need for confidentiality, the need for a close working relationship between the employer and employee, *id.* at 319, and the context in which the dispute arose. *See Connick*, 461 U.S. at 153, 103 S. Ct. at 1693. *See also Yoggerst v. Stewart*, 623 F.2d 35, 40 (7th Cir. 1980); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S. Ct. 2148 (1973).

In striking a proper balance, it is essential that we note the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his superiors for almost five years preceding the alleged adverse job action. The plaintiff's conduct at the March 2, 1984 faculty symposium illustrates the depths to which the relationship had disintegrated, as well as the disruption to the workplace. The plaintiff not only defied the procedures and planning for the meeting, but also openly invited other teachers to join his demonstration. In the five years preceding Hesse's transfer to traveling teacher status, the memorandum of December 8, 1984 was the only one of Hesse's memoranda that arguably dealt with a matter of public concern. This memorandum concerned a sensitive issue for which the plaintiff had been reprimanded by the administration. As the Supreme Court noted in *Connick*, "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of the policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 461 U.S. at 153-54, 103 S. Ct. at 1693. By the time of this memorandum, the plain-

tiff's intense hostility had created an atmosphere detrimental to workplace harmony and cooperation. The efficiency of the public educational system as it involved the plaintiff was adversely impacted.

In view of the district court's erroneous instruction to the jury, which permitted the jury to treat almost all of the plaintiff's memoranda as protected by the Constitution, the verdict was understandable. However, we must conclude that the interests of the school officials in promoting the efficiency of its public educational services far outweighed the interests of the plaintiff as a citizen in commenting upon the grading policies. As a matter of law, this is the only conclusion we can reach from an examination of the record as a whole.[4]

III

While the jury was not instructed that as a condition for recovery it must find that the protected expression was a substantial or motivating factor in the adverse job action, *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); *see also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416, 99 S. Ct. 693, 697 (1979), we need not, and in the context of a jury

[4] The dissent categorically concludes that Hesse's memorandum is constitutionally protected by artificially viewing the memorandum in isolation. While we do not contend that context is the determinative factor in the *Pickering* balance, in Hesse's case, the long-standing dispute between the parties cannot be ignored in reviewing the record. In *Connick*, the Supreme Court found that a questionnaire distributed by an assistant district attorney to other district attorneys in the office contained one issue of public concern, but on balance concluded that the questionnaire as a whole was not protected. The questionnaire was determined to be an act of insubordination by the plaintiff in reaction to her impending transfer. 461 U.S. at 151-54, 103 S. Ct. at 1692-94. Hence, Hesse's memorandum must be considered from the vantage point of its cumulative disruptive effect on the Board's ability to maintain harmony and discipline in the workplace.

trial, should not determine whether the defendants would have taken the same job action without regard to the memorandum of December 8, 1984. While it would have been difficult, if not impossible, for a reasonable jury to have concluded that the single memorandum of December 8, 1984 was a substantial or motivating factor in the adverse job action, that causal determination is uniquely a jury question.

While it would have been possible for us to remand for a new trial with appropriate determinations and instructions from the trial court,[5] we have determined as a matter of law under *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968), that judgment should have been entered for the defendants and against the plaintiff.[6]

IV

We therefore reverse the judgment of the trial court and remand with instructions to enter judgment for all defendants.

REVERSED.

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[5] Footnote 9 of the dissenting opinion miscomprehends our *arguendo* argument. We are merely noting that if we had concluded that Hesse's memorandum of December 8, 1984 satisfied the *Pickering* calculus, we would then have to remand this case for the jury's determination of whether the memorandum was a motivating factor in the transfer. *See Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. at 287, 97 S. Ct. at 576. We surmise that even if we had remanded, a reasonable jury, after considering all of the disruptive and unprotected statements made by Hesse, would have concluded that the memorandum did not trigger the transfer. We reject the dissent's contention that the mere proximity in time of the grade fraud memorandum and the October 13 speech before the Board of Education to the transfer makes them the motivating cause of the transfer. However, our consideration of this issue does not constitute a basis of our holding, since this issue is clearly one for the jury.

[6] In view of our disposition of this case, we do not consider other alleged errors in the jury instructions, the admission of expert testimony or the excessiveness of damages.

FLAUM, *Circuit Judge*, dissenting.

I respectfully dissent. I believe the majority errs in concluding that none of Hesse's speech is constitutionally protected. Because I conclude that there are at least two instances of protected speech, I would remand for a new trial to allow a jury to determine whether Hesse's constitutionally protected speech was a substantial or motivating factor in the defendants' decision to transfer him. If so, the defendants would then have an opportunity to demonstrate that they would have taken the same action in the absence of Hesse's protected exercise of his first amendment rights.

I.

A three-step analysis is required where a public employee's first amendment rights are at issue. *Knapp v. Whitaker*, 757 F.2d 827, 845 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985). First, the court must determine whether the plaintiff's speech is constitutionally protected. This is a question of law. *Connick v. Myers*, 461 U.S. 137, 148 n.7 (1983); *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1967); *Knapp*, 757 F.2d at 839, 845. If the plaintiff's speech is protected by the first amendment, then two issues of fact must be addressed. The first factual issue is whether the defendant's actions were motivated by the plaintiff's constitutionally protected speech. *Knapp*, 757 F.2d at 845. If the plaintiff can demonstrate that his or her constitutionally protected speech was a substantial or motivating factor in the defendant's actions, the defendant must then have an opportunity to prove that it would have taken the same action in the absence of the plaintiff's exercise of his or her first amendment rights. *Id.*

II.

To determine whether Hesse's speech is constitutionally protected, a two-part analysis is necessary. *Id.* at 839.

First, the court must decide whether Hesse's speech dealt with a matter of public concern. *Connick*, 461 U.S. 137. If so, the court must then employ a balancing test (the "*Pickering* balance") to determine whether or not the speech is constitutionally protected. *Pickering*, 391 U.S. 563.

A.

In order to determine whether Hesse's speech dealt with a matter of public concern the court must look at the "content, form, and context" of Hesse's statements. *Connick*, 461 U.S. at 147.[1] Several of Hesse's statements were personal in nature; they related solely to Hesse's disagreements with the schools' administrators over his

[1] The majority argues that in reaching the conclusion that some of Hesse's speech was related to matters of public concern I fail to consider the form and context of his speech. I respectfully disagree. The *Connick* "matter of public concern" test and the *Pickering* balance are independent analyses which must be applied consecutively to determine whether a public employee's speech is protected under the first amendment. The form, content and context of an employee's speech can lead to the conclusion that it is related to a matter of public concern; yet, the court may subsequently conclude under the *Pickering* balance that the speech is not protected by the first amendment.

Just as the content alone of an employee's speech cannot insure first amendment protection, neither can the context of the speech automatically remove that protection. The mere fact that an employee is involved in an ongoing dispute with his or her employer does not mean that as a matter of law his or her speech can never relate to a matter of public concern under *Connick*. In fact, in *Connick* itself the Court held that some of the plaintiff's speech related to a matter of public concern, even though the plaintiff was involved in an ongoing dispute with her supervisor. *Connick*, 461 U.S. at 149. *See also Rode v. Dellarciprete*, No. 87-5368, slip op. at 9-14 (3rd Cir. April 28, 1988) (employee's speech dealing with matter of public concern protected by first amendment even though speech arose out of employee's personal employment problem).

negative evaluations, class assignments, and relationship with the administration. This speech is not related to any matter of public concern and therefore I agree with the majority that it is not protected by the first amendment. Some of Hesse's speech, however, dealt with the district's disciplinary policies for students, grade fraud, and the procedures for evaluating teachers' performances. Each of these issues relates directly to the quality of education in the Schaumburg School District and therefore I would find that this speech addressed matters of public concern.[2] These were the issues Hesse raised during a faculty symposium on March 2, 1984, in speeches before the Board of Education, and in his grade fraud memorandum of December 8, 1984. Because each of these statements addressed

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[2] Not every instance of an employee's speech will share the same form, content and context. Simply because some of an employee's speech is not protected by the first amendment, either because it is not related to a matter of public concern under *Connick* or is not protected under the *Pickering* balance, it does not necessarily follow that none of the employee's speech is protected. The district court erred in this case because it improperly instructed the jury that all of Hesse's speech was protected. The majority errs because it improperly concludes that none of Hesse's speech is constitutionally protected. The proper approach is to apply the appropriate legal analysis to each instance of Hesse's speech to determine its protected status.

In *Knapp*, for instance, this court analyzed a teacher's speech and concluded that his statements to the school board regarding his evaluations and class assignments did not address matters of public concern and were therefore unprotected. His statements about the travel reimbursement for coaches, the sufficiency of the school's liability insurance for athletic activities, and complaints about the district's grievance procedures, however, were of interest to the community and therefore dealt with matters of public concern. *Knapp*, 757 F.2d 827. *See also Connick*, 461 U.S. 137 (one question in an employee's questionnaire asking co-workers if they felt pressure to work on specified political campaigns dealt with an issue of public concern, but the remainder of the questionnaire did not).

matters of public concern, the court should apply the *Pickering* balance to determine whether they are constitutionally protected.[3]

B.

Under *Pickering*, the court must balance the state's interest in an efficient and effective school system with a teacher's right as a citizen to speak out on matters of public concern. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The *Pickering* Court considered a number of factors and determined that the plaintiff's speech was protected because: (1) it was not directed at anyone with whom Pickering had contact on a daily basis; (2) Pickering's employment did not require personal loyalty to the school board or superintendent; (3) the speech did not disrupt harmony among his co-workers; and (4) Pickering's immediate supervisors' ability to maintain discipline was not negatively affected by the speech. *Id.* at 569-70. In *Connick*, although a portion of the plaintiff's speech touched upon a matter of public concern, the Court concluded that under the *Pickering* balance it was not constitutionally protected. *Connick*, 461 U.S. at 149-54. In reaching this conclusion, the Court considered several factors including: (1) whether the speech negatively affected the plaintiff's ability to perform her job; (2) the need for a close working relationship between the plaintiff, Myers, and her supervisor, Connick; (3) the time, place and manner of the speech; and (4) the con-

[3] The majority agrees that Hesse's memorandum of December 8, 1984 addressed a matter of public concern. The majority, however, neglects to consider the constitutionally protected nature of Hesse's speeches on the same topic before the Board of Education on October 13, 1984 and other occasions. See *infra* note 6.

text of the underlying dispute between Myers and Connick. *Id.* at 150-54.[4]

Hesse's memorandum of December 8, 1984 was directed to the Principal of Schaumburg High School and members of the Board of Education. It summarized the points Hesse made in his presentation to the Board of Education on October 13, 1984 regarding his perception that there was significant grade fraud at Schaumburg High School. Hesse's concern was with a policy the district had adopted which required teachers "*not to use the actual percentage a student achieves in each nine week period and on the final exam* when they average out the final semester grade." December 8, 1984, Grade Fraud Memo (emphasis in the original). Hesse's disagreement with this policy resulted from his conclusion that

> the current policy is simply very effective at passing students who would otherwise fail if their actual percentage scores were used to determine their grades. I believe that this is a deceptive practice that makes the public think the district is doing a far better job than it actually is. But, the greatest harm is that such an illogical method of averaging scores sends students into the job market without the necessary knowledge they need to function on the job.

Id.

This memorandum was directed both at persons with whom Hesse had daily contact at Schaumburg High School and at members of the Board of Education with whom he had no daily contact. The memorandum did not have

[4] Myers' speech arose in the context of a personal dispute between Myers and Connick regarding her pending transfer to another office. In the context of this dispute, Myers' speech threatened to disrupt the office, undermined Connick's authority, and had the potential to destroy necessarily close working relationships in the office. As a result, the Court concluded that Myers' first amendment rights were outweighed by the government's interest in effectively providing services to the public. *Connick*, 461 U.S. at 154.

the potential to undermine the principal's ability to maintain discipline in the school, nor should it have affected the harmony among Hesse's fellow teachers. Furthermore, this speech did not arise directly out of the context of a personal dispute. I would therefore conclude, as a matter of law, that Hesse's first amendment right to speak out as a citizen on this matter of public concern was not outweighed by the state's interest in providing an efficient public educational system. I would hold that this memorandum is constitutionally protected speech.[5]

Similarly, Hesse's October 13 speech before the Board of Education also involved the issue of grade fraud.[6] The same *Pickering* factors can be applied to this instance of speech, yielding the conclusion that it is also protected by the first amendment. This speech could not have undermined the principal's ability to maintain discipline in the school; it did not affect the harmony among Hesse's fellow teachers; it did not directly arise in the context of a dispute between Hesse and the school administration;

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[5] In applying the *Pickering* balance to Hesse's December 8 memorandum, the majority places undue weight on the nature of Hesse's relationship with the school's administration. The nature of this relationship, however, is neither the sole nor the most important factor in the balance.

[6] At trial Hesse testified that he spoke before the Board of Education on approximately eight separate occasions during the fall and winter of 1984-85. On these occasions Hesse spoke about the problems of student discipline in public education, grade fraud, competency testing for students and teachers, and teacher evaluation procedures. If this case were remanded, each of these instances of public speech would have to be analyzed to determine whether under *Connick* and *Pickering* they are protected by the first amendment. To the extent that Hesse was speaking about grade fraud and general disciplinary problems in public education, this speech relates to matters of public concern. Unless these other occasions involved different factors than those present when Hesse spoke to the Board of Education on October 13 about the issue of grade fraud, applying the *Pickering* balance to these additional instances of speech should lead to the conclusion that they are also protected by the first amendment.

and the time, place and manner of the speech were appropriate.

Hesse's third instance of speech on a matter of public concern occurred at a faculty symposium on global education on March 2, 1984. At the symposium, Hesse asked the guest speaker various questions related to the topic of proper teacher evaluation procedures. Hesse voiced his complaint that the procedures utilized at Schaumburg High School were improper because they allowed students to evaluate their own teachers. Hesse argued that to ensure positive evaluations, teachers were pressured to give their students higher grades than they deserved.

Applying the *Pickering* balance to this speech, I would conclude that it is not constitutionally protected. First, Hesse spoke out at a mandatory faculty symposium which most of the Schaumburg High School faculty attended. The time, place and manner of Hesse's speech therefore posed a significant threat to the harmony between Hesse and his co-workers, to Hesse's employment relationship with his colleagues and superiors, and to the principal's ability to maintain discipline in the school. Several of the faculty members testified that Hesse's actions at the symposium were both offensive and embarrassing. Furthermore, some of the questions arose out of a dispute Hesse was having with his superiors regarding his own negative evaluations.[7] In this situation, the state's interest in pro-

[7] The majority asserts that because I "concede" that some of Hesse's questions at the faculty symposium arose out of a dispute between Hesse and the school's administration, that this speech could not have been related to a matter of public concern under *Connick*. As previously noted, however, this argument improperly collapses the *Connick* "matter of public concern" test into the *Pickering* balance. See *supra* note 1. *See, e.g., Rode*, No. 87-5368, slip op. at 11 (in determining if speech deals with a matter of public concern, complete reliance on employee's motivation for speaking is inappropriate). Furthermore, the mere fact that Hesse's speech at the faculty symposium may have arisen out of a dispute with his employers is not dispositive of the *Pickering* balance. As is clear from the discussion in the text, a number of factors, of which Hesse's ongoing disagreement with the administration is just one, lead to the conclusion that this speech is not protected by the first amendment.

moting effective and efficient public educational services outweighed Hesse's right as a citizen to speak out on this matter of public concern. I would conclude that this speech is therefore not constitutionally protected under *Pickering*.

C.

Because there are at least two important instances of constitutionally protected speech, I would remand this case for a new trial.[8] Hesse should have the opportunity to have a jury decide whether or not his transfer to a less desirable position was in retaliation for his exercise of his first amendment rights. A reasonable jury could find that Hesse's transfer was in retaliation for his protected speech for a number of reasons. First, Hesse's protected speech occurred much closer in time to Hesse's transfer than any of his unprotected speech. Second, Hesse's speeches to the Board of Education and the December 8 memorandum were directed to persons both inside and outside the Schaumburg High School administration. These instances of speech may therefore have had a greater potential to embarrass the school administrators who made the decision to transfer Hesse. Finally, the question of possible grade fraud is a sensitive issue which could demonstrate that the quality of education in the Schaumburg School District was significantly lower than the public had been led to believe. A jury should therefore be permitted to determine the factual questions of whether the defendants' actions were a result of Hesse's constitutionally protected speech, and whether the defendants would have taken the same action in the absence of this speech.[9]

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[8] There may be more than two instances of protected speech depending on the specific facts of Hesse's other addresses to the Board of Education during the fall and winter of 1984-85. See *supra* note 6.

[9] The majority's discussion of the propriety of a remand for a new trial creates an unnecessary ambiguity. The majority concludes that Hesse's memorandum of December 8, 1984 is *not* con-

(Footnote continued on following page)

III.

Employees who have no disagreements with the manner in which an institution is run are unlikely to see any problems in need of public attention. As a result, these types of first amendment cases typically involve disgruntled employees. If employees are automatically denied first amendment protection simply because they are involved in some type of dispute with their employer, serious issues of public concern will never be brought to light. *See Rode v. Dellarciprete*, No. 87-5368, slip op. at 12 (3rd Cir. April 28, 1988) ("Dismissing Rode's speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected employee from speaking out."). An employer who takes adverse action against a disgruntled employee because the employee is disrupting the workplace, rather than in retaliation for the employee's exercise of his or her first amendment rights, will prevail.

The majority places undue emphasis on what it sees as the cumulative disruptive nature of Hesse's relationship with the defendants.[10] What the majority fails to fully

[9] *continued*
stitutionally protected under *Pickering*. The majority goes on to speculate, however, that "it would have been difficult, if not impossible, for a reasonable jury to have concluded that the single memorandum of December 8, 1984 was a substantial or motivating factor in the adverse job action. . . ." *Supra* at 11. If as a matter of law none of Hesse's speech is constitutionally protected under *Pickering*, there are no remaining factual issues for the jury. Nonetheless, the majority states that "it would be possible for us to remand for a new trial. . . ." *Id.* If one accepts the majority's holding that there is no constitutionally protected speech, a remand would *not* be permissible.

[10] I must also express my disagreement with the impression that the majority creates regarding the extent of first amendment protection for sarcastic speech. The majority appears to argue that sarcastic speech is somehow less deserving of first amendment protection than is "serious" speech. See *supra* at 8. The mere sarcastic nature of otherwise protected speech, however, cannot remove it from first amendment protection. The reader should not be left with a contrary impression.

comprehend is that to prevail an employee must prove not only that his or her speech is protected, but that it was a substantial or motivating factor in the employer's adverse job action. Furthermore, the employer can defend itself simply by showing that it would have taken the same adverse action in the absence of the protected speech. An employer is not prohibited from taking adverse job action against employees who disrupt the workplace, but an employer cannot do so in retaliation for an employee's constitutionally protected right to free speech.

Some of Hesse's speech is deserving of first amendment protection, and I would therefore reverse and remand for a new trial.

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JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

June 20, 1988

Chicago, Illinois 60604

June 10, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge **Nicholas J. Bua** Presiding.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS **ORDERED AND ADJUDGED** by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

For the Seventh Circuit

Jul 11, 1988

Chicago, Illinois 60604

July 7, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge
Nicholas J. Bua
Presiding.

ORDER

The opinion issued in this case on June 10, 1988 is now amended by deleting from the first line of part III the word "not."

IT IS SO ORDERED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Sep 12, 1988

POSTED

September 9, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge
Nicholas J. Bua
Presiding.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by plaintiff-appellee and the answer filed by defendants-appellants, a vote was requested on the suggestion for a rehearing *en banc*. A majority of the members of the original panel voted to deny the petition for rehearing, and the suggestion for rehearing *en banc* did not receive a majority of the votes of judges in active service. Chief Judge Bauer and Judges Flaum and Ripple voted to grant rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* is DENIED.

Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-987

In The

Supreme Court of the United States

October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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January 6, 1989

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QUESTIONS RESTATED

1. Should the Petition be granted to review the Court of Appeals' holding that a teacher's disruptive protests against criticisms and negative evaluations of his professional performance, directed exclusively to his employers, constituted employment speech on personal disciplinary issues, not matters of public concern?

2. Should the Petition be granted to review the Court of Appeal's alternative determination that a teacher's eight-year campaign of hostile, abusive protests to his superiors against his performance evaluations was disruptive?

3. Should the Petition be granted to review the Court of Appeal's analysis of the case under the multi-faceted tests articulated by this Court in *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), instead of an "objective" test based on the gross subject matter of the speech?

4. Where the case was submitted to the jury on an erroneous instruction indicating that the First Amendment protected all the petitioner's speech, should the Petition be granted to review the degree of deference due the factual findings of the trial court?

STATEMENT REQUIRED BY RULE 28.1

Respondent Board of Education of Township High School District No. 211, Cook County, Illinois, is a municipal corporation, with no parent company, subsidiary, or affiliate.

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No. 88-987

In The

Supreme Court of the United States

October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

This case presents the unique fact pattern of an eight-year controversy between a teacher and his employers, consisting of heated, often angry and insulting reactions against critiques of his professional performance. Despite dozens of communications between the teacher, petitioner David Hesse, and the respondent school officials, the conflict intensified.

As matters escalated, Hesse joined polemics on educational issues to the defense of his teaching practices. All such communications were directed to his superiors, in the context of responses to professional criticism.

After years of this hostile dialogue, respondents directed Hesse to cooperate with the evaluation process, improve his teaching, and cease his insubordinate commentary. Hesse charges that this directive as well as various negative evaluations, and a routine transfer to an equivalent position with no loss in pay, were made in retaliation against his exercise of First Amendment freedoms.

Proceeding by differing analyses, all three members of the Seventh Circuit panel held that the First Amendment does not protect the speech that Hesse now puts in issue. There is no reason to review their painstaking analysis, or their unanimous result.

COUNTERSTATEMENT OF THE CASE

Despite Hesse's[1] argument for an "objective," content-based analysis of First Amendment issues, his Statement of the Case omits his actual speech.

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[1] As used in this Brief in Opposition, "Hesse" refers to petitioner David Hesse. "School Board" or "School District" refers to respondent Board of Education of Township High School District No. 211, and sometimes collectively refers to the Board and individual board member respondents Robert Creek, Anna Countryman, Anne Koller, Joseph Marchiori, James Rogers, and Robert Seger. "Gaza" refers to respondent Jack Gaza, principal of Schaumburg High School, where Hesse was employed during the 1983 - 1985 period. "Institute" refers

(Continued on following page)

Hesse bases his claim on speech concerning his conduct on two occasions during the 1983-84 school year: (1) a classroom display of anger; and (2) a protest at a mandatory teacher's institute. (Pet., pp. 3-4.) The speech at issue thus includes Hesse's speech at the teacher's institute (discussed below, pp. 5-8), two internal memoranda about that occasion (Pl.Ex. 15, and Def.Ex. 4), and several meetings between Hesse and his immediate supervisors.[2] (Discussed below, pp. 4-5, 8-10.)

Hesse characterizes the contents of his speech as "discipline, grading, and evaluation issues", and presents these exchanges as isolated occurrences. (Pet., p. 3.) His speech, however, must properly be viewed – as did the jury, trial court, and appellate court – within their immediate context of Hesse's personal reaction to professional criticism, as well as the broader perspective of eight years of protest.

(Continued from previous page)

to the teachers' institute held March 2, 1984, pursuant to Sections 3-11 and 24-3 of the School Code, Ill.Rev. Stat. ch. 122, ¶¶3-11 and 24-3 (1987). The record is cited as "R.", and the transcript as "Tr.". Hesse's Petition for Writ of Certiorari is referred to as "Petition" and is cited as "Pet." or, where appropriate, by parenthetical page citations. The opinion is published as *Hesse v. Board of Education of Township High School District No. 211, Cook County, Illinois*, 848 F.2d 748 (7th Cir. 1988).

[2] The Seventh Circuit also reviewed several later communications that Hesse made during the 1984-85 school year. 848 F.2d at 752 *et seq*, and at 756 *et seq*. On petition for rehearing, Hesse advised the appellate court that his claim was based on his statements during the 1983-84 school year, particularly his speech at the Institute and ensuing discussions. (Pet. for Rhrg., pp. 3-4.) Hesse pursues the same theory in this Court. (Pet., pp. 3-5.)

The following Counterstatement of the Case supplies the actual content of Hesse's speech, as well as the context and the form in which it was made.

A. The Conference About Hesse's Display Of Anger In The Classroom.

The first speech in issue occurred during a meeting between Hesse and his principal, Jack Gaza, concerning an angry outburst when Hesse's students failed to complete a research assignment. Tr., p. 43 (Hesse). Hesse brandished a roll of masking tape and "read them the riot act", announcing: "This kind of course doesn't need a bunch of lazy asses . . . ". Tr., p. 118 (Hesse); pp. 493-94 (Gaza); pp. 483-84 (Weimer); Def.Ex. 16. Hesse then kicked a chair and threw down the tape, which crashed against a metal cabinet. Tr., p. 43 (Hesse), pp. 493-94 (Gaza), pp. 483-84 (Weimer), Def.Ex. 16. Hesse walked out of the classroom, leaving the students by themselves for the rest of the period. Tr., p. 42 (Hesse), pp. 493-94 (Gaza). Gaza received written complaints from students about the incident. *Id.* Two complained that Hesse had "gone berserk in the Crafts class." Tr., p. 43 (Hesse).

At the meeting, Hesse explained that he "presented this 'anger' act" to establish discipline, because the students would be using dangerous equipment in class. Tr., p. 43 (Hesse). Suggesting that Hesse could motivate students in a more positive way, Gaza cautioned Hesse that his behavior had been unacceptable, and instructed Hesse not to repeat it. Tr., pp. 260-61 (Gaza). Hesse told Gaza "I felt it was a teaching technique that I would use again." Tr., pp. 43-45 (Hesse); pp. 494-95 (Gaza); Def.Ex. 16.

Gaza recorded this meeting in a file memorandum (Pl.Ex. 47), additionally noting:

> The conversation degressed [sic] to his [Hesse's] unhappiness with the public education system and specifically some of District 211's procedures.
> He felt the Art Department was a dumping ground for students who could do little else. He referred to some of his students as morons and idiots.
> My impression is that Mr. Hesse rationalizes his actions because he is frustrated and unhappy. I believe the reason he doesn't leave education is that he fancys [sic] himself somewhat of a crusader for the improvement of the system. Although he is knowledgeable in his field I feel his attitude and methods are a determent [sic] to the Art Program at Schaumburg High School.

Id. The record is otherwise silent as to what Hesse said during this digression over his unhappiness.

The Seventh Circuit found no issue of public concern in connection with this incident.

B. Hesse's Speech At The Teacher's Institute of March 2, 1984.

Hesse received a bad performance evaluation on February 28, 1984. (Pl.Exs. 11, 12 and 13.) It focused on his poor relationship with his students, and his lack of cooperation with administrative procedures, particularly with evaluations. *Id.* Several days later, the School Board held a teacher's institute with mandatory faculty attendance, as provided by Illinois law. Ill.Rev.Stat. ch. 122, ¶¶3-11, 10-19, and 24-3 (1987). Dr. Clark, a prominent educator, gave a keynote speech on global and future education; Hesse took the occasion to protest his evaluation. Tr., pp. 48-50 (Hesse); pp. 262-64, 288-89, 495 (Gaza).

During several minutes of rhetorical questions to Dr. Clark, Hesse accused the school district of using teacher

evaluations to inflate grades: "through the threat of a bad evaluation, you either have high grades and you pass the kids or you are not a good teacher." Tr., p. 50 (Hesse). "I pointed out that I, myself, had received from a previous principal, Mr. Weimer, a perfectly good evaluation at the end of the school year, and the next year rolled around, and suddenly I had bad evaluations." Tr., p. 50 (Hesse).[3]

In one of the two memoranda for which Hesse claims Constitutional protection, he characterized his speech at the Institute as follows:

> You accuse me of acting unprofessionally by using the meeting to discuss my personal evaluation. Nonsense, Jack. . . .The issue under discussion was grade fraud, or, to put it more politely, grade inflation.
>
> * * *
>
> I, naturally, leaped to the defense of our district. I suggested that we were fortunate to have you present to answer these questions. Furthermore, I pointed out that even though in the previous year, Carl Weimer and the district art chairman, Bob Wheat, had given me a perfect evaluation, and that this year you gave me a bad one, you could assure us that such a strange turn of events was not due to the existence of such a policy in our district. Needless to say I was crushed when you failed to inform Dr. Clark that the administration in our district never abused the evaluation process in such a manner. . . .

Pl.Ex. 15. Hesse made all of these statements during a few minutes of questions to the lecturer. Pl.Ex. 15 (5 minutes); Tr., p. 241 (30 seconds – 1 minute)

---

[3] Other members of the audience testified that Hesse's questions dealt with his own concerns, not the speaker's topic. Tr., pp. 416, 447 (Maddox), p. 398 (Templeton). One teacher recalled Hesse asking personal questions, as though he were trying to get back at the administration. Tr., pp. 390-91, (Burtt).

(Wheat); p. 262 (5 minutes) (Gaza); p. 531 (2-3 minutes) (Purgatorio).

Hesse also resisted the seating arrangements at the Institute. Tr., p. 390 (Burtt). The guest speaker had requested closing the back of the auditorium so the faculty would sit near his visual presentation. Tr., p. 390 (Burtt). Believing the administration had cordoned off the back of the auditorium with masking tape "to create the illusion that everyone is enthusiastic to be there and wanted to sit close to the presentation", Tr., pp. 50-51 (Hesse), Hesse defiantly sat in the back, and refused Gaza's request to move closer. Tr., pp. 49-51 (Hesse). After the lecture Hesse staged a demonstration, pulling and ripping up or throwing tape, and displaying it to the assembly. Tr., pp. 50-51, 156-57 (Hesse); p. 241 (Wheat). He asked the guest speaker "whether or not he thought it was a good working relationship among teachers and administrators in school systems if teachers were hurded [sic] around like they were little children by taping off whole rows in an auditorium to create the illusion that teachers were actually approving of how they were spending that day." Tr., pp. 51-52 (Hesse).

Numerous faculty members and administrators were embarrassed or offended by Hesse's conduct at the Institute. Tr., pp. 390-91 (Burtt), 394-96 (Templeton), pp. 264, 288-89 (Gaza), Pl.Ex. 14. Members of the audience asked Hesse to sit down, be quiet, and stop interrupting the program. Tr., pp. 394-96 (Templeton); pp. 416-17 (Maddox); p. 528 (Ferguson); p. 532 (Purgatorio).

In unrebutted testimony Nurse Beverly Templeton stated that she went to see Hesse immediately after the incident, out of concern for his conduct. T., p. 396 (Templeton). Cf. pp. 516-17 (Hesse). He told her "that he was

unhappy with his evaluation, and that he felt that if administrators could evaluate the teachers, the teachers should be able to evaluate the administrators." *Id.*

The majority considers this evidence of disruption essential, noting

> the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his superiors for almost five years preceding the alleged adverse job action. The plaintiff's conduct at the March 2, 1984 faculty symposium illustrates the depths to which the relationship had disintegrated, as well as the disruption to the work place.

848 F.2d at 753. The dissent similarly concludes that Hesse's speech at the Institute

> posed a significant threat to the harmony between Hesse and his co-workers, to Hesse's employment relationship with his colleagues and superiors, and to the principal's ability to maintain discipline in the school . . . Furthermore, some of the questions arose out of a dispute Hesse was having with his superiors regarding his own negative evaluations.

Id. at 757.

C. Hesse's Two Memoranda Concerning The Teachers' Institute.

Gaza reprimanded Hesse for unprofessional behavior at the Institute in a memorandum on March 6, 1984. Pl.Ex. 14. Hesse met that afternoon with Gaza and Assistant Principal Donald Maddox. As summarized by Gaza in a March 7, 1984 memorandum, they discussed Gaza's memorandum and Hesse's evaluation; Hesse challenged their administrative experience and their expertise to evaluate him. Pl.Ex. 16; Tr., pp. 420-22 (Maddox); Def.Ex. 9.

In this context, Hesse wrote the two memoranda for which he now claims Constitutional protection, Plaintiff's Exhibit 15 and Defendant's Exhibit 4. The first lengthily responds in the following vein to Gaza's March 6 memorandum:

> Jack [Gaza], I suggest that you trot over to your dictionary and look up the meaning of the word "monopolize". I suspect that you do not have the slightest notion of what it means. Then go down to the math department and have them show you how to figure out a ratio. . . . [O]nly an irrational person would assert that I hold a monopoly on the situation. So you see Jack, you really have me confused. You are either possessed by moments of irrationality or perhaps harbor some unstated reason for presenting so distorted a view of reality. Please provide further clarification and guidance on this matter so I can understand what you are struggling to say. . . .
>
> Now, Jack, stop and think for a moment. Do you really want to accuse *me* of acting "irrationally" with regard to the seating arrangements for the meeting? Once again I suggest that you trot back over to the dictionary and look up the meaning of the word, "irrational." I encourage you to do this because of the irrational and insulting "reason" you gave for why two rows of seats were so sloppily taped off. Your inept taping job almost made me trip and injure myself. I might have broken my neck and died! Please be more thoughtful in the future since I know that you would have a difficult time coming to school each day knowing I wasn't going to be there! . . .

In his second memorandum, Defendant's Exhibit 4, Hesse replies to Gaza's March 7 memorandum. Hesse again rejects as "irrational" Gaza's directive to behave professionally, and protests Gaza's refusal to tour the Art Department:

> Words cannot express the shock and disappointment I felt when you refused to leave your office and examine the evidence I wished to present. Such an

> act of irrationality and closed-mindedness is simply beyond my professional comprehension. This is especially disturbing when it is found in an individual charged with the responsibility to do a competent, fair, and impartial evaluation of a teacher!

Hesse goes on to say he has shown his evaluation to students:

> Your subjective and irrational prediction that any student who saw the evaluation would be engulfed with "negative feelings" and that the classroom would "further depreciate into a poor environment," is ludicrously wrong. Your evaluation of me has so far proven to be simply a source of much laughter and they wonder how you ever reached such conclusions, especially since you never even came into my room to evaluate me! Of course when they saw all the mistakes on Don's evaluation of me, they were speechless!
>
> I must say they thought it was so inaccurate that it was hilariously funny to them.

The panel unanimously found that both of these memoranda raised personal, not public, concerns. 848 F.2d at 751-2 and 755.

D. The Context of Hesse's Communications.

The four instances of speech here in issue must be understood in the context of professional criticism in which they occurred. Most importantly, a negative evaluation at the end of February, 1984 triggered Hesse's conduct at the Institute two days later, and his two subsequent memoranda about that event. All four communications were part of a long-running controversy between Hesse and the administration over criticisms of his work.

1. Hesse's February 28, 1984 Evaluation.

Although Hesse had previously clashed with the administration over his grading practices (*see* below, pp.

13-16), the evaluation that sparked Hesse's Institute-related behavior (Pl.Exs. 11, 12 & 13) said nothing about that issue. It cited Hesse's "apparent lack of warmth and concern for students" and his "attitude of aloofness, superiority, and planned detachment, resulting in a stifled atmosphere devoid of meaningful dialogue and expression" between Hesse and students. It recommended "creating an atmosphere that encourages positive verbal exchange between students and teacher." Pl.Ex. 13.

The evaluation further noted Hesse's failure to cooperate with evaluation procedures:

> *Uncooperativeness with administrative procedures* is evidenced by Mr. Hesse's poor effort and attitude toward completing the self evaluation document, cooperating with own department NCA [North Central Association] self study, and working with established disciplinary anecdotal procedures . . . . *Without a positive attitude toward constructive professional growth in the immediate future, Mr. Hesse will continue to be a liability* to his students, his department, his school, and his chosen profession.

Id. (Emphasis supplied).[4]

The evaluation additionally observed:

> Mr. Hesse's strong differences with the American educational system, the administration policies of both district and Schaumburg High School prevent him from reaching that potential. As a result of these differences in philosophy, Mr. Hesse's students and the Art Department are placed in the middle. The resulting strained environment impacts upon his students, the Art program, and ultimately the school.

Id.

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[4] In addition to the instances of noncooperation addressed in the evaluation, Hesse sometimes violated School District procedure by refusing to sign his evaluations. Tr., pp. 147-48, 154-55 (Hesse).

Hesse responded to his evaluation in an undated internal memorandum that parodied his evaluation in a purported review of his reviewers. Tr., pp. 134, 148 (Hesse); Pl.Ex. 17. Hesse mimicked language from his own evaluation, for example:

> According to my formal evaluation of you from my position as both a teacher and a taxpayer, I think that somewhere inside you there may be the skills to perhaps, possibly, maybe, with luck, enable you to become effective administrators . . . .
>
> Without a positive attitude toward constructive professional growth in the immediate future, Mr. Gaza and Mr. Maddox will continue to be liabilities to their teachers, their school, and their chosen profession.

Pl.Ex. 17. Like the evaluation, Hesse's memorandum suggested improvements for Gaza and assistant principal Maddox, asserting invalidity of the teacher evaluation process,[5] the meaninglessness of student opinion, and the administration's incompetence to evaluate him.[6] *Id.*

Hesse concluded by raising the issue of grade inflation, and stating:

> P.S. . . . I also have sent along a copy of Hans Christian Anderson's story "The Emperor's New Clothes". I hope that all of you, including Mr. Kolze

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[5] At trial Hesse similarly stated that to evaluate properly, the evaluator had to be with the teacher five days a week for nearly every day of the year. Tr., p. 164 (Hesse).

[6] Hesse admitted at trial that he has never accepted any criticism from Maddox. Tr., pp. 120-21 (Hesse), Pl.Exs. 21, p. 2, and 35, p. 2. Hesse told Maddox that he was not competent to evaluate him. Tr., pp. 449-50 (Maddox). Hesse also testified, "I object to being evaluated by people who don't understand anything about my field, and Mr. Whoever-was-in-that-day, they don't have a background in Art." Tr., p. 185 (Hesse).

and the school board, take the time to read it, comprehend it, and apply the wisdom it contains to your lives.

2. The On-Going Dialogue Between Hesse And The Administration.

The speech in issue was part of an eight-year series of challenges to criticisms of Hesse's performance. The first in this sequence of communications, a six-page reply to student criticisms of his teaching in 1977, sets a pattern typical of his subsequent writing. Beyond responding to the specific criticisms, he questions the motives of his critics and the validity of the criticism process. Pl.Gr.Ex. 9.

In 1979 Hesse sent six more memos to his reviewers. He wrote two on January 19, 1979. Pl.Gr.Ex. 9. One replied to a parental complaint that Hesse gave students inadequate direction, misled students that near-failing projects were "fine", and gave too many extremely low grades. Admitting that "fine" only means a work will not fail, that he failed 52% of the class and gave 92% less then a "C", *id.*, Hesse claimed "little intention or need to change my teaching techniques . . . " *Id.* He rejected remedial directives from his assistant principal, asserting his "refusal to be intimidated by the threat of a poor evaluation by any of my superiors". *Id.*

This memo also attacked the authority of his department chairman, Robert Wheat, and belittled Wheat personally and professionally. (*E.g.*, "Now, really, if I, a simple minded art teacher can detect such an obvious contradiction, how is that a Department Chairman did not become aware of it?" *Id.*)

Hesse's second January 19, 1979 memo, Pl.Gr.Ex. 9, attacked assistant principal Dennis Garber's decision to

handle in writing a student's claim that Hesse had advised her to circumvent School District procedures:

> Wellllllll, really, when I here [sic] one of those kids say, "Weimer doesn't know his ass from a hole in the ground."; I, if I were a School Board member, would want to have, shall we say, a little less emotional and impartial judgment of Mr. Weimer's administrative ability . . . . Perhaps, just perhaps, there is a valid point somewhere in the person's observations, but lets [sic] get the "big picture" before we all start to go off the deep end with the memo thing.

Id.

In the fourth memo, dated March 13, 1979, Pl.Gr.Ex. 9, Hesse replied to an adverse evaluation by Weimer and Wheat, Def.Ex. 1, recommending no salary increase because of such deficiencies as rigid grading policies and neglect of his students, one of whom Wheat observed lying on the floor asleep. Hesse's memo attacked Wheat as too hostile and incompetent to review Hesse objectively. Pl.Gr.Ex. 9. Hesse opined that he should be evaluating the evaluators. *Id.*

In reply to a criticism by Wheat that Hesse had deliberately disregarded directives concerning disciplinary measures, Hesse's fifth memo, dated June 4, 1979, lengthily criticized Wheat's professional performance, and questioned why Wheat did not report himself for procedural infractions. Pl.Gr.Ex. 9. Hesse added:

> P.S. Since I recognize the fact that Mr. Wheat is One Of The Boys From When The District Was Young, and therefore has connections upstairs, I cannot help but wonder if anything will be done about his conduct, especially since he never seems to take the time to write up an evaluation on himself, and the district does not seem to supply the teachers with a form to evaluate the performance of Those Above Them.

Id.

Hesse's next memo (Pl.Gr.Ex. 9) responded to Wheat's evaluation of June 7, 1979 (Pl.Gr.Ex. 3), which cited, *inter alia*, Hesse's low opinion of his students, negative teaching methodologies, rigid grading procedures, and student dissatisfaction with his disciplinary procedures. *Id.* The memo asked "how in hell is it that the administration, with their wonderful 'teacher evaluation' procedures, cannot detect the presence of [incompetent] teachers in their staff?????" The memo was filled with such remarks as:

> I must admit that the thought has crossed my mind that not even Jesus Christ could get a good evaluation in a classroom once those doing the evaluation decided to abuse the evaluation instrument by distorting and deleting relevant information. . . .
>
> In fact, since *I* have nothing to hide about my conduct as a teacher in *my* classroom I have a special deal to offer you. If Mr. Wheat is willing to have a T.V. and a sound recording system in all of his classes next year, I too will be more than willing to have such a system in all of my classes. In that way we can all clear up all these rather subjective observations about my teaching ability. After all, by comparing me to a "master teacher" of many years of experience, surely my slightest flaws will show up in a most glaring manner when compared with his efforts. Great Idea, right????
>
> * * *
>
> Soooooooooooooo, let me just say that as *I* see the situation, this has been a *really fine year* of teaching, as far as I am concerned. (Undoubtedly such a statement on my part will inspire action to deprive me of yet more "mythical money" when I achieve my other M.A.s, my PhD [sic], and any salary I may earn as President of China.)

Pl.Gr.Ex. 9 (emphasis original).

Hesse's unauthorized grading practices ultimately caused a student to fail who would have passed under

district-wide grading policy. Tr., pp. 456-57 (Kolze). Kolze and Weimer met with Hesse on August 10, 1979 and directed him to follow all School District policies. Tr., p. 458 (Kolze). Kolze reiterated the warning in a letter of August 30, 1979 and advised him that "[d]isregard of Board of Education policies and procedures will constitute insubordination". Def.Ex. 11. Hesse temporarily conformed to District procedures.

E. The Notice to Remedy.

Based on findings of grossly insubordinate and uncooperative conduct, as well as disruptive and uncivil use of ridicule and defamatory remarks, the School Board sent Hesse a notice to remedy on June 1, 1984, in accordance with a statutory requirement that school boards give teachers the opportunity to cure remediable performance deficiencies. Ill.Rev.Stat. ch. 122, sec. 24-12 (1987). The School Board directed Hesse to remedy his conduct by, *inter alia*, the following:

> Cease writing letters to the administration critiquing or evaluating them as administrators. They, not you, are responsible for evaluation. . . .
>
> You are directed not to convert constructive criticism of your teaching into a challenge to the authority of the administration making that criticism. . . .
>
> You are directed to cease immediately all such insubordinate and sarcastic commentary.

Id. The School Board listed professional and pedagogical objectives for Hesse to follow, and warned that failure to take remedial action would be cause for dismissal. The notice specifically cited Hesse's two memoranda to the administration concerning his conduct at the Institute. *Id.*

On the same date, the School Board directed Hesse to submit to a psychiatric examination pursuant to its statutory authority to require medical examination of employees. Ill.Rev.Stat. ch. 122, ¶24-5 (1987), Pl.Ex. 25. When Hesse's attorney objected, the School Board withdrew the request. Pl.Ex. 27. The School Board was concerned with Hesse's episodes of bizarre and inappropriate behavior. Tr., p. 271 (Gaza). At trial Hesse admitted he suffered mental disequilibrium during the relevant time period, and that removal from classroom to study hall assignments helped him overcome depression. Tr., p. 173 (Hesse).

F. Later Communications.

Hesse continued his protests during the 1984-85 school year, addressing the School Board on numerous occasions, including a meeting on October 13, 1984. Tr., p. 98 (Hesse). The School Board, which had issued the notice to remedy at the end of the prior school year, had final supervisory authority over him as his employer. Some of Hesse's topics included low grading standards, competency testing for students and teachers, student discipline, and teacher evaluation procedures. Tr., pp. 98-100 (Hesse). The record is extremely vague as to the specific subject matter of his speech during any of these appearances at the School Board. *Id.*

Within five days in Mid-December, Hesse wrote four separate memoranda to the School Board. In the first, a memorandum to the School Board dated December 8, 1984, Pl.Ex. 38, Hesse questioned the method by which students' semester grades were averaged. He stated "the current policy is simply very effective at passing students who would otherwise fail," and suggested that the extant

policy "encourages district wide grade fraud." *Id.* The memorandum did not address Hesse's current evaluations, but dealt with the grading policy he had previously violated, leading to the August, 1979 warning letter. Def.Ex. 11, and Tr., pp. 36-37 (Hesse).

Three days later, in a memorandum dated December 11, 1984, Pl.Ex. 39, Hesse wrote the School Board concerning his remediation notice in the following language:

> The truth of the matter is that far from being someone who rejects constructive criticism I am someone who eagerly awaits the arrival of such information, especially when it is based on actual facts. I am also waiting for the Cubs to win the World Series. . . .
>
> I suggest that you consider your duties as a public servant and take the following actions:
>
> 1. Do try to cheer up a wee bit and make an effort to develop a sense of humor about this entire situation . . .
>
> 11. . . . After all, it [the taped rows at the Institute] looked more like a photo I once saw showing the web of a spider on LSD, rather than a professional demarcation of a reserved seating area.
>
> 12. . . . That Mr. Gaza has yet to have even the smallest item named after him is also a matter of fact. While he is still in his "rookie" years I have no doubt that as his judgments improve, the board will name something far larger than an ashtray after him as well.
>
> 13. Jog on over to a globe and notice that we are living in the United States of America.

Hesse wrote two more memoranda the following two days, December 12 and 13, 1984. Pl.Ex. 40 & 41. Hesse complained to the School Board that his teaching load and the requirement that he submit daily lesson plans were unconstitutional harassment. He accused the School Board of trying to make his job as unpleasant as possible, and of paranoia. *Id.*

The full panel agreed that the memoranda of December 11, 12, and 13 did not touch on matters of public concern. 848 F.2d at 751-52 and 755. The dissent contended that the December 8, 1984 memorandum, as well as Hesse's October 13 appearance before the School Board, were constitutionally protected, and would have remanded for further proceedings under *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Hesse*, 848 F.2d at 754 *et seq.*

The majority proceeded on the *arguendo* assumption that the December 8 memorandum dealt with a matter of public concern. *Id.* at 752. However, viewing the memorandum "from the vantage point of its cumulative disruptive effect on the Board's ability to maintain harmony and discipline in the workplace", *id.* at 753, n.4, it concluded that it was constitutionally unprotected. *Id.* The majority similarly determined that the October 13 speech was no "more than part of a long-running defense of his teaching practices." *Id.* at 751 n.2.

As Hesse advised the Seventh Circuit in his Petition for Rehearing (at 3), his communications during the 1984-85 academic year are not the basis of his claim.

G. Hesse's Subsequent Employment in the District

Hesse had twice requested a transfer from Schaumburg. Tr., pp. 95-96 (Hesse). Union representative Gerz suggested Hesse's transfer. Tr., pp. 207-08 (Gerz); p. 273 (Gaza).

For the 1985-86 school year, it became necessary to transfer an art teacher qualified to teach photography from Schaumburg to a traveling position between two other district high schools. Only two teachers were qualified, and neither responded to the administration's

request for a volunteer. Hesse was chosen because the other had previously been transferred involuntarily. Tr., pp. 276-77 (Gaza); pp. 176-77 (Hesse); pp. 351-53 (Chapman).

When Kolze informed Hesse of the reasons for his selection in a meeting about the transfer, Hesse acknowledged that this would be an opportunity to try out the other two schools. Tr., pp. 459, 463 (Kolze); Def.Ex. 12.

A full-time position opened at one of those schools for the 1986-87 school year. Hesse applied and got the job. Tr., p. 354 (Chapman). Hesse works there to this day, and is not seeking employment outside the School District. By changing jobs, he would lose his tenured status. Tr., pp. 171-72 (Hesse). He has lost no pay. Tr., p. 174.

H. The School Officials' Responsibilities.

In their respective capacities as overseers and administrators of the School District, appellants were responsible for supervising the School District's 700-member faculty, including Hesse. Appellants are statutorily charged with promulgating educational policy, and with enforcing the School District's educational policies throughout the system.[7] Ill.Rev.Stat. ch. 122, ¶10-20.5 (1987).

---

[7] The School District's educational policies are set forth in the School District's Policy and Procedure Handbook (Pl.Ex. 10). All teachers receive a copy of the handbook. School Board policy requires teachers to follow certain grading procedures, admonishing:

> The subject of grading is extensive and complex; yet it is imperative that all teachers maintain uniformity in grading and evaluating students. IT IS FOR THIS REASON THAT THE FOLLOWING PROCEDURES MUST BE CAREFULLY FOLLOWED.

(Continued on following page)

I. Charge to The Jury On Protected Speech.

Over defendants' objection, the trial court gave the following instruction on the First Amendment:

> I instruct you, ladies and gentlemen, that plaintiff's statements on the subjects of grading, and student discipline policies, and teacher evaluation procedures constitute speech on matters of public concern and are, therefore, entitled to Constitutional protection.

Tr., p. 622.

Hesse asked the jury for damages of $1.00. Tr., p. 595. The jury returned a verdict of $125,000. R. 20.

(Continued from previous page)

(Emphasis original.) School District policy further requires teachers to maintain professional working relationships with other teachers, administrators, and support staff, and to be cooperative. Tr., pp. 328-29; *Id.* The evaluation process and criteria, which were prepared jointly by the School Board and the teachers' union, are set forth at *id.* Tr., pp. 329-30 (Chapman).

In teacher evaluation, cooperativeness is an essential attribute. The handbook defines "cooperativeness" as follows:

> A cooperative teacher is one who can work with colleagues to accomplish certain goals, one who is willing to compromise when necessary to attain agreed upon goals, one who uses positive methods and appropriate channels to initiate change. Cooperativeness is not synonymous to being a "yes" man. For a cooperative teacher can be a critical thinker and an initiator of change. The means he uses to obtain his goals are the key to cooperativeness, rather than the specific goals in which he believes.

Id. Tr., pp. 333-34 (Chapman).

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE SEVENTH CIRCUIT PROPERLY APPLIES THE *CONNICK* TEST.

A. Hesse Misconceives The *Connick* Test.

Hesse seeks review under a reductive interpretation of *Connick* that would nullify its fact-sensitive response to the whole of a case. Limited to gross content, Hesse's test would elevate *all* speech on education to the level of public concern.[8]

Over twenty years ago this Court cautioned against any such narrow view of First Amendment questions:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 569 (1968).

In *Connick* this Court rejected a content-based test for a flexible three-part analysis:

> Whether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement, *as revealed by the whole record.*

Id. at 147-48 (emphasis supplied.) The complexities of language and communication require scrutiny of form

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[8] *Bowman v. Pulaski County Special School District*, 723 F. 2d 640 (8th Cir. 1983), which Hesse here cites, was decided under the *Pickering* balance. It did not review whether the speech (on physical abuse of students) was a matter of public concern.

and context. Thus *Connick* directs scrutiny of the *circumstances* of a communication, 461 U.S. 149, n. 8, and of the role of the speaker:

> We hold only that when a public employee speaks not *as a citizen* upon matters of public concern, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision. . . .

Id. at 147 (emphasis supplied).

Applying these principles, the *Connick* Court stressed that the *focus* of the plaintiff Sheila Myers's speech was "to gather ammunition for another round of controversy with her superiors", in "an attempt to turn that displeasure into a *cause celebre*." 461 U.S. at 148. So it is here.

B. The Seventh Circuit Properly Considered The Content, Form and Context of Hesse's Speech.

1. There Is No Reason to Reconsider The Personal Content of Hesse's Speech.

Remarkably, while ignoring the contemptuous, insubordinate statements that fill his speech, Hesse argues for a content-based approach to First Amendment analysis. An expression of hostility, or a complaint about one's job, may be the content of speech. An insult, an attack, a gibe, or a slur may also constitute content. Hesse would remove them from consideration.

There is no basis for Hesse's claim that in the panel decision, "the tone and the intent of the speaker were given considerable weight over the subject and content of the speech." Pet., p. 7. On the contrary, the panel closely scrutinized the individual content of each of Hesse's writings and speeches, concluding that they "were directed to the defense of his personal teaching methods

and his resentment of the evaluations and criticisms of those methods".[9] 848 F.2d at 751 *et seq.* This highly personal content dictated the holding that the communications were outside the pale of public concern.

Hesse's so-called "objective" test, which attaches "public concern" to *all* speech about education, in fact renders meaningless the *Connick* criterion of content.

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark - and certainly every criticism directed at a public official - would plant the seed of a constitutional case.

Connick, 461 U.S. at 149.

2. There Is No Reason To Reconsider The Personal Form and Private Context of Hesse's Speech.

Raw words do not constitute "speech." Their meaning derives from their form and their context, as well as their dictionary definition. The Seventh Circuit properly considered the insubordinate, intensely personal tone of Hesse's language.[10] Hesse's pervasive ridicule and

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[9] The court noted a sole exception, the December 8, 1984 memorandum, which was "arguably directed to a matter of public concern," and thus subject to the *Pickering* balance. 848 F.2d at 752.

[10] Hesse notes (at 6) that the majority considered the sarcastic, offensive form of Hesse's speech. The majority in fact cautioned:

> We are not implying that sarcastic speech is not entitled to constitutional protection. We only note the sarcastic form of Hesse's speech as a *measure of its disruption to the workplace,* as well as its *highly personal tenor.*

848 F.2d at 752, n.3 (emphasis supplied). *Eiland v. City of Montgomery,* 797 F.2d 953 (11th Cir. 1986), which concerned a brief satiric poem, in rhymed couplets, on an election issue, is inapposite.

contempt were not just the medium, but an intrinsic part of the message.

Hesse incorrectly characterizes the panel opinion as "look[ing] *primarily* to Hesse's *disagreement* with the school district . . . and interpret[ing] his *intent* as removing the issue from the realm of public concern". (Pet., p. 6, emphasis partially supplied.) On the contrary, the Court of Appeals looked primarily to the *content* of Hesse's speech, determining that any discussions of educational policy were tangential to his personal employment interests, and that his communications "were not intrinsically on a matter of public concern." 848 F.2d at 752.

C. The Decision Of The Seventh Circuit Accords With The Opinions Of Other Circuit Courts.

Hesse cites no case, and the School Board knows of none, in which repeated verbal abuse like Hesse's was held to be protected. On the contrary, "It is firmly established that the First Amendment's shield does not extend to speech and conduct amounting to insubordination directed at school officials." *Kelleher v. Flawn*, 761 F.2d 1079, 1084 (5th Cir. 1985) (collecting cases). The *Kelleher* court thus upheld a teacher's demotion due to belligerence and insubordination to her department chair.

This conclusion is reinforced by the Eleventh Circuit's recent decision in *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988), which considered a professor's communications, both public and private, on a wide range of university issues. The court found inactionable his expressions of contempt for the university president: "Obviously, much of the men's dispute, and Kurtz's speech, derived from their apparent personality conflicts,

a matter not of public concern." *Id.* at 729. Finding, in contrast, that "[t]he content of his criticism of the university's spending priorities related to a matter of public concern", *id.* at 730, the court carefully limited its holding to the professor's complaints "beyond the scope of internal management." *Id.* Moreover, unlike this case, no factual or thematic nexus bound the professor's personal grievances to the rest of his speech.

No circuit holds, as Hesse argues (at 7), that an employee's involvement in a dispute with a public employer abolishes First Amendment protections. All agree that the same instances of speech may share public and private aspects. *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988). All of the cases Hesse cites concern major public issues, inapplicable here. *Cf. Zamboni v. Stamler*, 847 F.2d 73 (3d Cir. 1988) (charge that a promotional program evaded statutory civil service requirements a matter of public concern); *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988) (charges of financial improprieties, drug use and eligibility cheating in an athletic program a matter of public concern); *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988) (public interview alleging victimization by racial discrimination).[11]

Context or form may be meaning-determinative for one communication, irrelevant to another. These cases

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[11] Hesse cites *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir.), *cert. denied*, 108 S.Ct. 102 (1987), as holding that electioneering did not constitute a matter of public concern due to the employee's motive of personal gain. Pet., p. 7. In fact, the Fourth Circuit decided the case under the *Pickering* balance, citing evidence of deep disruption to the police department from the employee's self-interested conduct.

show the *Connick* test's responsiveness to the full range of employee speech.

II. THE DECISION OF THE SEVENTH CIRCUIT PROPERLY EMPLOYS THE PICKERING BALANCE.

Hesse charges that the Seventh Circuit "employed a subjective balancing test, *creating* imagined harm to outweigh free speech". Pet., p. 9 (emphasis supplied). This accusation arises from Hesse's own misunderstanding of the nature of disruption.

A. The Panel Did Not "Engage Its Imagination To Weight The Balance In Favor Of The Employer."

Hesse's assertion that there is no factual evidence of disruption is belied by the massive documentary and testimonial evidence of Hesse's persistent insubordination and defiance of legitimate authority, as it applied to his own teaching responsibilities. Hesse's verbal assaults on his superiors undermined vital working relationships and obstructed the functioning of important School District procedures.

Providing quality education demands effective supervisory relationships between teachers and their designated overseers. As the Fourth Circuit stated in *Chitwood v. Feaster*, 468 F.2d 359, 361 (4th Cir. 1972), an educational institution

> has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply

because his noncooperation and aggressive conduct are verbalized.

Thus, to sustain their high responsibilities, educators must maintain loyal, cooperative relationships with their superiors no less than firefighters, *see Germann v. City of Kansas City*, 776 F.2d 761 at 763, 765 (8th Cir. 1985), *cert. denied*, 107 S.Ct. 63 (1986) (department head "relied on management employees to implement his policies on a day-to-day basis in the field"; close supervision impossible, thus personal loyalty "critical to the management structure"); attorneys, *see Connick*; and appraisers, *see McAdams v. Matagorda County Appraisal District*, 798 F.2d 842, 847 (5th Cir. 1986) (employee's challenge to board damaged important working relationships, despite employee's job independence, where employee responsible for executing board directives).

B. The Decision Accords With The Opinions Of Other Circuit Courts.

None of the cases Hesse cites (Pet., pp. 9-10) concerns the direct, flagrant insubordination that this case presents. Bald defiance of one's supervisors, in their supervisory capacity, is not "mere potential for disruption," but an "objectively justifiable basis" for discerning harm to the employer's interests. *Connick, supra*, at 163 n. 3. (Brennan, J., dissenting); *cf.* Pet., p. 10.

III. THIS FACTUALLY UNIQUE CASE ILLUSTRATES NO PERVASIVE PROBLEMS IN SCRUTINY OF SPEECH BY PUBLIC EMPLOYEES.

With its eight-year private protest on the single issue of performance criticism, this case is inapt for reviewing any inconsistencies in the analysis of First Amendment issues by the federal courts. It requires an analysis that

would not illuminate the ordinary First Amendment case.[12]

This appeal, moreover, presents no significant controversy. The four episodes of speech that Hesse contests are well beyond the scope of Constitutional protection, as the panel unanimously determines.[13] They illustrate no issue requiring this Court's further guidance.

Although beyond the scope of the Petition, the issues framed by the dissent are likewise of no consequence. The December 8, 1984 memorandum was written back to back, in the space of a few days, with three memoranda on similar themes but addressing Hesse's work problems directly. In keeping with *Pickering*, the majority properly relied on the powerful nexus between this writing and Hesse's explicitly personal and abusive statements.

The record is too vague, as the majority correctly concluded (and as the dissent strongly suggests, 848 F.2d at 756, n. 6), to support the dissent's view that Hesse's comments during his various appearances before the School Board were anything more than part of his "long-running defense of his teaching methods." *Id.* at 751, n. 2.

The Petition should be denied.

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[12] It would not, for example, illuminate any conflicts among the factually distinct cases listed at pp. 7-8 of the Petition.

[13] The majority and the dissent differ slightly as to the analysis of Hesse's speech at the Institute. The dissent applies the *Pickering* balance. 848 F.2d at 757. The majority more appropriately determines that under *Connick*, Hesse's anxieties about his recent evaluation not only motivated, but dominated, his few minutes of speech. *Id.* at 751, n. 2. Consistent with *Pickering*, the majority considers the evidence of disruption as well. *Id.* at 753. There is no reason to review the unanimous result of these parallel analyses.

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court, in a decision that does not conflict with the decision of any other court of appeals. The Petition has failed to show any reasons why this Court should review any aspect of the decision. The Petition for Certiorari should be denied.

January 6, 1989.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 88-987

In The

Supreme Court of the United States

October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE AND JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

I. AN OBJECTIVE STANDARD SHOULD BE APPLIED HERE

In true Orwellian fashion, the defendants have attempted to recast the facts of the case to rewrite history. The answer brief is replete with mischaracterizations far too numerous to refute in their entirety (e.g. that a 2-1 decision in the Appellate Court is a "unanimous result" and "as matters escalated, Hesse joined polemics to the defense of his teaching practices," implying that Hesse's educational issues were an afterthought).

Defendants have artfully presented partial quotations and a skewed rendering of the evidence in an attempt to cast Hesse as an insubordinate teacher who could not tolerate criticism. This ploy is obviously designed to convince this Court that the case is merely a personnel dispute. We shall here attempt briefly to put the facts in perspective.

A. HESSE'S WRITINGS HAVE LONG CONTAINED PROTECTED SPEECH

It is important to realize that Hesse had for many years expressed his opinion on matters of grade fraud, inadequate discipline and the use of teacher evaluations to silence teachers.

Examples of Hesse's early (1977-79) memos (Pl. Gr. Ex.9) are as follows:

> There are two major developments in education today that the national Media have found to be well worthy of their attention. The first was that the press discovered that school systems, administrators, and teachers were becoming the target of lawsuits centering around the idea that a student's constitutional rights were being violated in many different respects by the various public school systems around the country.
>
> The second development that the press found of great interest was that a surprisingly large number of students were designated by their grades

to have passed courses when, in reality, later circumstances painfully disclosed the fact that these students lacked the basic skills that the passing grades were supposed to indicate they had acheived.

This regrettable situation has resulted in lawsuits that are based on the idea that the schools have defrauded the public by falsifying the evaluation of student achievement.

* * *

I will open this response by noting what I feel to be the somewhat embarassing (sic) fact that SCHOOL DISTRICT 211, and other districts as well, are being forced by public pressure to institute competency testing for all students before allowing them to graduate. This seems, to me, to be a heavily symbolic plead (sic) of nolocontendere to the media's charge that they cannot be trusted to grade students honestly, as schools used to be able to do in times past.

I will attempt, in this memorandum, to show how the problem of false grades came into existence and how, erroneous evaluation, along with their advice of financially punative (sic) action against teachers, are actually prime contributors to the problem of more and more money being spent by public schools, while students walk across stages to accept diplomas that have come to certify the very real possibility that the student just might not even be able to read it!

It is my view that the evaluation given me, the information it contains, and its recommendations, represent an attempt to intimidate a good teacher into giving false high grades and establishing low standards in his classes. The motivation for this lies in the fact that the department, the school, and the district have a vested interest in being able to give the false appearance of doing a good job, to the taxpayer who must pay all the bills. I hold the position that such actions as this cannot help but eventually have a delierious (sic) effect on the students and should be stopped.

* * *

. . . . . it is my contention that it is because I have refused to go along with the administration in its efforts to turn a course into a dumping ground, where students could expect to pick up an "easy credit", just for coming to class; a class where I would be expected to cover up the poor performance of students and the administration and make them "look good on paper"; this, I contend, is the real motivation behind the critical evaluation I have received and its recommendation that I be subject to punative (sic) financial action.

* * *

It is incredible; it is strange; and, it is amazingly amusing; the similarity in the situation of public education today, and the theme that runs through that old, old, children's fairy tale called, "The Emperor's New Clothes".

Today, "The Emperor" translates into "The Taxpayer"; I'll let you struggle with the problem of figuring out who shold be cast in the role of the two "tailors".

The public has paid out billions in an ever increasing educational effort that, in theory, has brought us, "the finest set of threads in the land". Educators scurry across The Empire assuring us that if students fail test it's only because they have been given the wrong test! They heap effusive praise upon His Royal Majesty, "The Taxpayer", for his past wisdom of spending more and more funds upon the Public School System That Adorn The Land.

Despite the contents of these earlier memos, the former principal, Carl Weimer, did not regard them very seriously and declined even to characterize them as sarcastic. (T.488)

B. FOR SEVERAL YEARS PRIOR TO 1983-84 HESSE'S EVALUATIONS WERE EXCELLENT

The evaluations of Hesse's teaching for the school years 1979-80, 1980-81, 1981-82, and 1982-83 were all marked in the highest category with no indications of needing improvement. (Pl. ex. 4, 5, 6, 7) The same was true of the January and February 1977 evaluations (Pl. ex. 2) and the November 1978 evaluation (Pl. ex. 3). In his December 1978 and May 1979 evaluations he was criticized on issues of grading and discipline. (Pl. ex. 3)

Thus the implication that Hesse began the 1983-84 school year on a wave of "protest" and "disruption" is completely inaccurate.

C. THE 1983-84 SCHOOL YEAR: SPEECH AND CONSEQUENCES

Jack Gaza became the principal at Schaumburg in 1983. His first real encounter with Hesse came in September after Hesse's "anger display" to his class which had come to school entirely unprepared. Hesse explained to Gaza that he was concerned about the safety of the students and that he would explain his actions to any parents and apologize if they believed he was being unreasonable. Apparently Hesse also took the opportunity to further express his educational opinions to Gaza who concluded that Hesse saw himself as a crusader.

Even from the defendants' version of the events transpiring at the teacher's institute, it is evident that Hesse spoke about matters of public concern in his questions of the speaker. However, the defendants' attempt to portray Hesse as a teacher who "staged a demonstration" is contrary to the evidence. Hesse, as well as several other teachers sat in an area taped off by masking tape which he described as looking like "the web of a spider on LSD. . . ." (Pl. ex 39) He held up a ball of tape to illustrate his question of the speaker about treatment of teachers.

That Gaza was upset by Hesse's questions at the intitute cannot be doubted because he immediately undertook a concerted effort to get rid of him. He engineered a list of "goals and objectives" which were presented to the Board as shortcomings in Hesse's teaching but which were shown by the testimony of the Art Department Chair (Wheat) to be false. This list was appended to a resolution of the Board preparatory to dismissing Hesse. The Board also directed him to undergo a psychiatric examination without ever asking the administrators for the reason. (T. 454) Gaza threatened Hesse with distribution of the psychiatric report and with dismissal if Hesse refused the examination. (T.78, Pl. ex 26)

The next fall Gaza presided over a meeting designed to harass Hesse and to fill his personnel file with negative material in a transparent attempt to get rid of him. The meeting was so blatant that Wheat threatened to resign his chairmanship. (T.255) This pattern of behavior continued with unusually large assignments of study halls and the transfer to a travelling teacher position.

When the level of harassment continued unabated, Hesse filed suit. By that time, Hesse's personnel file was full of negative evaluations which, according to the testimony of Dr. Donald Johnson, an educational expert, would essentially keep him from obtaining work in any other district. (T. 187-198.)

D. APPLYING AN OBJECTIVE STANDARD

The defendants urge that Hesse's speech is not protected because his statements on grade fraud, student discipline and the use of evaluations to intimidate teachers were made in reaction to criticisms by the administration. In other words, if the speech is in any way personal to the application of disputed rules to the employee, defendants contend that First Amendment protection is automatically foreclosed. The Seventh Circuit appears to have agreed

in this instant cause although it ruled to the contrary in *Knapp v. Whitaker*, 757 F2d 827 (7th Cir., 1985).

Such an analysis is a subjective one, requiring a court to delve into all of the facts and eliminate from protection those criticisms of public agency policies which are being applied to the speaker's duties. That interpretation is undesirable for two reasons. First, it denies protection to those persons who are in the best position to criticize how public agencies fulfill their functions. Secondly, by its very subjective nature, the test is a potent means of second guessing a jury. If a court concludes that the *motive* of the speaker was merely retaliation for, or protection from, legitimate criticism and direction, First Amendment protection can be denied under this test. The proper approach, however, is to allow the jury to determine, under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) whether the *protected* speech (i.e. that speech which dealt with issues of public concern) was a substantial or motivating factor in the personnel action or whether the same action would have been taken irrespective of the speech.

Subjective issues such as motive have generally been considered more appropriate for determination by the fact finder. In this case, however, the Appellate Court overrode the jury's determination of motivation with its own interpretation.

Because *Connick v. Myers*, 461 U.S. 138 (1983) dealt with a single questionnaire it lent itself more to a clear delineation of what speech is protected. In most instances, however, the communications to be analyzed are numerous and frequently combine speech which is public in nature with that which is private. A subjective analysis of such communications complicates an already difficult task. A more objective, content-based analysis should be employed at the first level, since it is better to err in granting more constitutional protection to speech than less. Hesse's state-

ments, therefore, on the issues of grading, discipline and teacher evaluation procedures should be granted protection irrespective of the fact that they were subjects in dispute between Hesse and the administration.

II. DISRUPTION ATTRIBUTED TO EXERCISE OF FIRST AMENDMENT RIGHTS SHOULD NOT BE INFERRED FROM SARCASM OR FROM THE MERE FACT OF STRONGLY EXPRESSED IDEAS

The defendants, and indeed the Seventh Circuit, infer disruption from the following sources: Sarcasm in 1977-79 memos differing with district policies and defending Hesse's teaching methods; 2) the "personal tone" of Hesse's memoranda; 3) the testimony of the school nurse, the principal (a defendant) and a teacher charged with the auditorium management that Hesse's questions at the institute embarrassed them; and 4) testimony that members of the audience told Hesse to sit down and stop talking at the institute. This appears to comprise the "massive documentary and testimonial evidence" referred to by the defendants. This evidence must be analyzed in its proper perspective

First, as shown above, the 1977-79 memos preceded 4 years of excellent evaluations of Hesse. Thus it could hardly be said that the events occurring in the 1983-84 school year were set against a background of havoc or disturbance nor was a shred of evidence adduced to that effect.

Secondly, there was no evidence that Hesse worked closely with any of his superiors. Gaza and he rarely had contact and Gaza did not even do evaluations based upon classroom observations. (T. 287) Maddox, the assistant principal, was assigned to do annual evaluations of Hesse and had only evaluated him twice before the goals and objectives were written. (T. 293) In this organizational framework, without greater evidence in the record, it is difficult to see how the statements made by Hese "un-

dermined vital working relationships and obstructed the functioning of important school district procedures." (Resp. brief p. 27) Further, it should be noted that in 1984 and 1985 Hesse had a statutory right to respond to written memos in his personnel file. Ch. 48, Sec. 2002, *Ill. Rev. Stat.* (The statute was declared unconstitutionally vague in its definition of records in 1986.)

The balance of the basis for the defendants' claim of disruption is the testimony referred to above. Cumulatively it could hardly amount to "numerous witnesses." The upshot of defendants' assertion that such testimony should defeat Hesse's right to speak is that the question of First Amendment protection is subject to a popularity vote.

The evidence presented at trial clearly demonstrated that any disruption which was caused by Hesse's statements was really caused by Gaza's actions to get rid of Hesse. Significant in this regard is that the claimed basis for Gaza's actions was Hesse's teaching. Hesse was never accused *at the time* of being disruptive. The record further demonstrated that Hesse complied with direction.

The trial court observed the witnesses and heard the evidence. Had it been convinced under the test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) that Hesse's interests in speaking were outweighed by the supposed disruption he caused, the court would have entered judgement notwithstanding the verdict. It did not.

The jury heard the testimony including two former students of Hesse's and saw the evidence including slides of Hesse's students' work. (Pl ex. 8) The jury was properly instructed, pursuant to *Mt. Health City School District v. Doyle*, 429 U.S. 274 (1977), that if the defendants would have taken the same action irrespective of the protected speech, they must find in favor of the defendants. They did not.

There is no doubt that Hesse's speech was occasionally

sarcastic, but sarcasm is not the same as disruption or even insubordination as defendants seem to contend. An objective test analyzing the actual disruption or the genuine threat of disruption is more appropriate than the subjective test applied here which has overinterpreted that threat arising from sarcasm.

CONCLUSION

For the reasons set forth above, Petitioner respectfully urges this Honorable Court to issue a Writ of Certiorari to review the judgement and opinion of the Seventh Circuit.

Respectfully submitted,

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